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IN THE

Supreme Court of the United States

No. 384 October Term, 1940

HOWARD E. BREISCH,
Petitioner

vs.

CENTRAL RAILROAD OF NEW JERSEY,
Respondent

BRIEF FOR PETITIONER

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Opinion Below 1
Jurisdiction

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v.

CENTRAL RAILROAD OF NEW JERSEY

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in 112 F. (2) 595 (R. 110).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 3, 1940.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In disregarding the decisions of the Pennsylvania Supreme Court;

2. In holding that the Pennsylvania Workmen's Compensation Act was the sole remedy of the petitioner for a violation of the Federal Safety Appliance Act.

QUESTION PRESENTED

Did the Circuit Court of Appeals err in deciding that the employee had no right to sue for damages at law and that his sole remedy was to recover compensation under the provisions of the Pennsylvania Workmen's Compensation Act?

CONCISE STATEMENT OF THE CASE

The Central Railroad of New Jersey, respondent in this action, was on the 31st day of December, 1936, engaged as a common carrier in Interstate Commerce and for many years had in its employ the petitioner, Howard E. Breisch, who on the aforesaid date was engaged for said respondent as an extra freight conductor. He was in charge of a drill crew consisting of a conductor, engineer, fireman and two brakemen, who were engaged in shifting loaded freight cars from certain positions in the yards of the American Steel and Wire Company, at Allentown, Pennsylvania, to be weighed on a weight scale before shipment to various parts of Pennsylvania and to States beyond. That while in the act of shifting a freight car upon the weight scale, the car ran wild, and the plaintiff in an effort to arrest the car, applied the hand-brake of said freight car which refused to operate, causing the runaway car to collide with another freight car on the same track, threw the petitioner off balance inflicting serious personal injuries which resulted in the amputation of his right leg.

The particular car in question which ran wild, was a car that was to be transported within the State of Pennsylvania. This particular car and the operation of the same was regarded by the Court that tried the case, as a distinctly intrastate movement.

The cause of complaint by the petitioner in this action of the respondent, the Central Railroad of New Jersey, was its failure to observe the provisions of the Federal Safety Appliance Act, because the freight car in question was not then and there, immediately at the time of the accident, equipped with a safe and secure appliance,

but on the contrary, was then and there equipped with a defective hand-brake which, when the emergency arose, failed to respond, thereby placing the petitioner in peril and resulted in the injuries complained of.

Petitioner brought his action against the respondent in the United States District Court, the same having been tried before the late Honorable Oliver B. Dickinson, then President Judge of said Court, with the result that the jury brought in a verdict in favor of the petitioner for damages in the sum of $12,000.00. Certain motions were made on the 2nd day of May, 1939, by the respondent to have the judgment set aside, and judgment directed in favor of the petitioner upon the whole record and in accordance with respondent's motion made at the time of trial, which was denied. The case was finally argued upon the motions made by the respondent before the Honorable Judge Dickinson, who in an opinion filed on the 8th day of June, 1938, denied the motions for new trial and judgment n. o. v., and directed that petitioner might enter judgment on the verdict rendered by the jury, with costs.

On April 27, 1939, in accordance with the verdict, the Court ordered that judgment be entered in favor of petitioner, Howard E. Breisch, and against the respondent, the Central Railroad of New Jersey, in the sum of $12,000.00 with costs.

The principal contention by the respondent before the United States District Court was to the effect that the petitioner had no common law remedy in the United States District Court, and that the petitioner was confined solely to the benefits of the Workmen's Compensation Act of the State of Pennsylvania. This contention was overruled, and petitioner's right of action in said Court was sustained in an opinion handed down by Judge Dickinson, as hereinbefore referred to.

The case is free from any error of the rulings of the Court on the question of evidence, or that there was not a violation of the Safety Appliances Act, or any exception to the amount of the verdict when the motions for new trial and judgment n. o. v. were advanced.

A petition for the writ of Certiorari from the United States Circuit Court of Appeals for the Third Circuit was made by Howard E. Breisch, the petitioner, on August 29, 1940, to the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States, and brief in support of said petition filed therewith.

The respondent took an appeal from the decision rendered in said proceedings by the Honorable Judge Dickinson on July 11, 1939, to the United States Circuit Court of Appeals for the Third Circuit, which appeal was argued on the 6th day of December, 1939.

The sole question argued before the Circuit Court of Appeals was the same question which had been argued before the United States District Court upon a motion for new trial and judgment n. o. v. On the 3rd day of June, 1940, the United States Circuit Court, for the Third Circuit, handed down a majority opinion reversing the decision of the lower court, the basis of which decision was to the effect that the only action for Howard E. Breisch, the petitioner, was as a claimant by virtue of the benefits of the Pennsylvania Workmen's Compensation Act, and that no common law remedy was available to him because of the injuries complained of in his cause of action. A dissenting opinion by Mr. Justice Alvin Jones, disagreeing with the majority opinion of said Court, was filed, in which he contended that the State of Pennsylvania, through its Court of last resort, to wit, the Supreme Court of Pennsylvania, had interpreted the Pennsylvania Workmen's Compensation Act, and read into said Act an exception to one injur-

ed as the result of a violation of the Safety Appliance Act in an intrastate movement, and that petitioner was clearly within his legal rights when he brought his action in the United States District Court for redress of the injuries which he sustained.

That said writ of Certiorari was granted by the United States Supreme Court on October 21, 1940, for the purpose of reviewing the decision of the United States Circuit Court of Appeals for the Third Circuit.

ARGUMENT

THE LEGISLATURE OF PENNSYLVANIA DID NOT INTEND TO INCLUDE RAILWAY EMPLOYEES AFFECTED BY A VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACTS WHEN IT ENACTED THE PENNSYLVANIA WORKMEN'S COMPENSATION ACTS.

The Circuit Court of Appeals in reversing the judgment of the Court below, took the position that the Supreme Court of Pennsylvania, in interpreting the Workmen's Compensation law of the State of Pennsylvania, was in error in being confused in its belief that the Safety Appliance Act provided an exception, implying a remedy at law to one aggrieved by its violation. That because of this confusion in its reasoning, it fell in error, and that since its decision was influenced by a misapprehension of the Supreme Court's interpretation of said Act, its decision cannot be upheld as binding upon this court. We cannot accept this reasoning. We do not admit that the Supreme Court of Pennsylvania was confused. It was well aware of the object and purposes of the Workmen's Compensation Act of Pennsylvania, and that Act nowhere makes any reference to employees engaged in interstate or intrastate employment, nor have any of the amendments to that Act since 1915 made any changes to the Act bearing upon any of the circumstances involved in the present proceedings. Even the recent Act of June 4, 1937, as well as the Act of June 21, 1939, amending and interpreting the Act of 1915, and its amendments, has made no modification that could be interpreted as having any bearing upon this subject.

It is quite significant that the original Act of 1915, Article 2, Section 202, reads as follows:

> "The employer shall be liable for the negligence of all employees while acting within the scope of their employment, including engineers, chauffeurs, miners, mine foremen, fire bosses, mine superintendents, plumbers, officers of vessels and all other employees licensed by the Commonwealth or other government authority, if the employer be allowed by law the right of free selection of such employees from the class of persons thus licensed."

Can it be said that the Legislature which enacted this humane legislation was unmindful of the thousands of railroad employees within the great State of Pennsylvania, that they should fail to mention them in this Act? Nor have they included them or made reference to this class of employees anywhere in the amendments that have since been enacted to this Act. At the time this legislation was passed, the railroad employees were the largest class of employees within the State of Pennsylvania. It is contended that the Legislature of Pennsylvania did not intend to include railroad employees who were engaged in interstate or intrastate movements, unless by their own contract of selection as provided by said Act, they wish to do so. The Legislature meant to preserve to such employees a right of action at law. This is the only reasonable inference that can be attributed to the fact that they are not specifically mentioned in the Act, or any of its amendments. Why should the Legislature specifically name large classes of employees in this very Act, and be silent with regard to the largest class of employees in the State at the time the Act was enacted? When this Act became law in Pennsylvania, the Safety Appliance Act had long since before been in effect. The framers of this Act, as well as the Attorney General of Pennsylvania, who by tradition passes upon all

important legislative acts before they are approved by the Governor of the State, must have known of the purposes and protection that the Act of Congress, through its enactment of the Safety Appliance Act, meant to confer upon the thousands of railroad employees of the State of Pennsylvania, and if this far reaching and revolutionary legislation was also to apply to the railroad employees, why were they not mentioned specifically in this Act? There is no evidence in this case that Breisch and the Central Railroad of New Jersey had entered into an agreement to be bound by the Workmen's Compensation Law of Pennsylvania, nor has there been the slightest intimation throughout the trial of this cause that such an agreement existed, or that such an agreement had been made in the State of Pennsylvania. We must bear in mind that the defendant in this cause is a foreign corporation engaged in interstate commerce, and because of diversity of citizenship, this action was instituted in the United States District Court. If then the framers of this Act and those responsible for its passage, in their wisdom, meant to exclude these employees because of any violation by the employers of the Safety Appliance Act, it is urged that the Supreme Court of Pennsylvania, when similar questions confronted them, based upon facts almost identical with the facts in the present case, gave cognizance to the purposes of the Act and interpreted the Act in the light of the promoters of the legislation.

The Supreme Court of Pennsylvania was not misled or confused. It passed upon two important cases in which it squarely met this issue.

The first case in Pennsylvania touching upon this subject was the case of *Sims vs. Pennsylvania Railroad Company,* 279 Pa., page 111, which involved a violation of the Safety Appliance Act, resulting in the injury of a brakeman because an automatic coupler on a railroad car was defective, causing serious personal injuries to the brake-

man. This was a case of a railroad engaged in interstate commerce, but at the time of the injury, the brakeman was engaged in an intrastate movement of said railroad car. The injured brakeman brought an action in trespass against the Pennsylvania Railroad Company, his employer, in the State of Pennsylvania. The question as to whether or not this plaintiff was relegated to his rights under the Workmen's Compensation Law was never raised, nor did the Supreme Court of Pennsylvania, the Court of last resort, question his right of action at common law.

Then followed the case of *Miller vs. Reading Company,* 292 Pa., page 44; where a brakeman was injured while engaged in intrastate commerce, by reason of a defect in a coupling device, which violated the Safety Appliance Act of Congress. The Court held that the State Court had jurisdiction of his claim against the Railroad Company, which employed him, and it held further that a railroad employee engaged in intrastate commerce and injured by a defective appliance, is not bound to seek redress in a Federal Court, nor can he be compelled to accept the provisions of the State Workmen's Compensation Act of June 2, 1915, and the supplements thereto. This case, as was the Sims case, is on all fours with the facts in the present case.

The Sims case, *supra,* was decided on January 7, 1924 and the Miller case, *supra,* on January 3, 1928, years after adoption of the Workmen's Compensation Act of Pennsylvania. Mr. Justice Roberts in the case of *Tipton v. Atchison, T. & S. F. R. Co.,* 104 A. L. R., page 831, at pages 836 and 837 said:

> "If these decisions of intermediate courts of appeal," (referring to the Walton and Ballard cases) "and the refusal of the Supreme Court of California to review them, amount to no more than a judicial construction of the compensation act as having, by its

terms, no application in the circumstances, they are binding authority in Federal Courts."

Does this not then support the decision of the Supreme Court of Pennsylvania in the Miller case? Judge Dickinson, in his opinion, in overruling the motion for new trial and judgment n. o. v. said:

> "Counsel for the defendant rely upon Gilvary vs. Cuyahoga, 292 U. S., 57; Tipton vs. Atchison, 298 U. S., 141, and a number of Pennsylvania cases. The Gilvary and Tipton cases are of little help to us. They rule that a State may withhold a common law right of action and substitute for it Workmen's Compensation; whether the State has done so is for the Courts of the State to determine and that the Courts of the United States are bound thereby."

Here there was a violation of a Federal statute, which affected the relationship between Breisch and the respondent company, and the Workmen's Compensation law of Pennsylvania did not cover and protect a situation of this kind. Isn't this the view and interpretation of the Supreme Court of Pennsylvania? We assert that it is. Shall Breisch, the petitioner in this action, be made to suffer because he initiated a cause of action, believing in the wisdom and decisions of the highest court of his State, and to deprive him of this constitutional right, when even learned judicial minds now differ as to the reasoning that the Supreme Court of Pennsylvania gave in the Sims and Miller cases, *supra*? The Legislature of Pennsylvania, since 1915, could easily have corrected this error if it meant to include this class of employees, who were or might be affected by the harm involved by a violation of the Federal Appliance Act, by amending the Workmen's Compensation Act and specifically correcting the same, but it has not done so. On May 28, 1937, the Legislature of Pennsylvania passed an

important Act known as the "Statutory Construction Act", No. 282, Volume 1 (1937), page 1019, at page 1024, section 52, sub-division 4, which reads as follows:

> "That when a court of last resort has construed the language used in a law, the legislature in subsequent laws on the same subject matter, intended the same construction to be placed upon such language."

It will be observed that this interesting legislation was enacted while the 1937 amendment to the 1915 Workmen's Compensation Act was being considered, and which was passed by a week later on June 4, 1937. Therefore, we contend that the Legislature, knowing of the Supreme Court's interpretation of the Workmen's Compensation Act of 1915, in its relation to the violation of the Safety Appliance Act, as expressed in the Sims and Miller cases, *supra*, did not wish to disturb that interpretation and desired that exception to remain undisturbed.

This Court must have judicial knowledge of the fact that the thousands of railroad employees in Pennsylvania, and the heads of their Unions are exceedingly alert in protecting the rights of its members, and that unquestionably they knew of the Supreme Court's interpretation of the Workmen's Compensation Act in making an exception in cases involving circumstances like those in the present cause. If they were not content with the wisdom of the interpretation by the Supreme Court of Pennsylvania, their influence would have been irresistible in having an amendment made to the present Workmen's Compensation law.

In this connection we are pleased to call to the Court's attention, that the Supreme Court of Pennsylvania made a very notable and drastic decision affecting the Workmen's Compensation Act of June 2, 1915, P. L. 736-739, because Article 3, Section 302 of that Act, among other things said:

> "In the employment of minors, Article three (the elective compensation provision) shall be presumed to apply unless the said written notice (renouncing compensation) be given by or to the parent or guardian of the minor."

Mr. Justice Simpson, speaking for the Supreme Court of Pennsylvania, in *Lincoln v. National Tube Company*, 268 Pa. 504, held "that the Workmen's Compensation law, does not apply to a minor who is incapable of entering into a contract, and has been employed in violation of an Act of Assembly. A minor so employed can maintain an action of trespass for personal injuries received during the course of his employment." This same Court again speaking through Mr. Justice Simpson in the case of *King et ux. v. Darlington Brick & Mining Co.*, 284 Pa. 277, again reaffirmed the aforesaid principle.

Here then we have an illustration of the Supreme Court of Pennsylvania reading into the Workmen's Compensation Act an excepted right. This decision by the Supreme Court of Pennsylvania rendered in this particular case, was embraced in an amendment to the Workmen's Compensation Act of June 4, 1937, P. L. 1552, Sec. 1.

The Legislature of Pennsylvania made another very important correction to the Workmen's Compensation Act of 1915, in that it gave a minor employed by his parents a right of action against his parents for an injury that he may have received while in the employ of his parents. (Sec. 1, Act of June 4, 1937, P. L. 1552.) With all the many important corrections that the Legislature has made to the Workmen's Compensation Act of 1915, as well as the new provisions which have been added by amendment to said Act, the Legislature did nothing to bring within the Compensation Law, the claims of intrastate employees for injuries received through the employer's violation of the Federal Safety Appliance Act.

There can be but one reasonable deduction, and that is, that the Legislature of Pennsylvania did not intend to include within the purview of the Compensation Law the employees of the railroads, who might be injured as the result of a violation of the Federal Safety Appliance Act.

The Federal Safety Appliance Act of 1893, as amended by the Act of 1903, did not prescribe a remedy in the Act itself. What it did do was to amplify an existing common law right of action. That right of action was a common law remedy, and therefore, one injured as the result of a violation of said Act, had a common law right of action against the employer, either in the State Court or in the United States District Court, in the latter instance depending upon citizenship. So that in Pennsylvania, from 1903 until the passage of the Pennsylvania Workmen's Compensation Act, there was no question as to what remedy the petitioner could employ. That remedy was an action at law, and up until 1915, anyone injured by virtue of a violation of the Federal Safety Appliance Act in Pennsylvania, could employ but one remedial action, and that was an action at law. This Court has held in the Tipton case that it was up to each State to prescribe a right of action for a breach of the Safety Appliance Act.

Here again we are met at the cross-roads. Did the Legislature of Pennsylvania, in 1915, when it passed the Workmen's Compensation Act, take away from the individual who was injured as a result of a violation of the Federal Safety Appliance Act, a right of action at law and substitute therefor the Workmen's Compensation law, or did it give to such an individual an alternative remedy, either to pursue his remedy by an action at law, or pursue his remedy under the provisions of the Workmen's Compensation Act?

We again reassert our conviction that the Workmen's

Compensation Act of Pennsylvania did not take away a right of action at law, but left it to the aggrieved party to pursue either remedy. This he could do by entering into an agreement with his employer to be bound under the Workmen's Compensation Act, and not having done so, he was free, as in this case, to pursue his action at law.

The provisions of the Federal Safety Appliance Act had for its object the protection of the employees of the railroads against injury and death, and to insure greater safety to the travelling public. It is doubted whether the Congress ever passed a more salutary piece of legislation. The imposition of this positive duty upon the railroad employers created a relationship in this respect far different from the ordinary relationship of employer and employee. We must bear in mind the impelling reasons why Congress passed the Safety Appliance Act. Prior to the passing of the Safety Appliance Act, railroad employees were constantly subjected to great hazards, and thousands were physically maimed, and hundreds of others lost their lives, because of the failure of the railroad employers to equip their railroad equipment with efficient and safe devices. Railroading has always been regarded as a highly specialized employment. There were exacting duties imposed upon railroad employees that, because of the nature of the employment and its relation to the safety of the travelling public, made the relationship between employer and employee a totally different one than is known to exist between employer and employee in the general field of employment. In other words, it was a classified employment. It was a field of employment distinct and separate from the ordinary and general employment of employees, and was so known and recognized by everyone.

This fact must have been in the minds of the framers of the Workmen's Compensation Act of Pennsylvania, or they would have specifically mentioned in the Act, rail-

road employees as has already been commented upon earlier in this brief. The Supreme Court in the Miller case, *supra*, recognized this fact, and gave expression in its opinion "but as to demands not arising from ordinary relation of employer and employee, such as the enforcement of rights fixed by Federal statute, their powers remain as if no such State legislation was in force." Mr. Justice Jones in his dissenting opinion *(Central R. R. of N. J. v. Breisch*, 112 Fed. (2) 595), gives emphasis to this reasoning, for he says:

> "As the claim in the Miller case arose out of the employer's violation of a duty to its employee which was not incident to 'the ordinary relationship of employer and employee', the apparent intent of the state court decision was to exclude the claim from the provisions of the compensation act as not being within the purview of that statute as written. The effect of the state decision is that the legislature, by implying from the acquiescence of the parties a contract for compensation which is presumed from their failure to renounce formally the provisions of the compensation act, did not thereby embrace within such implied contracts claims not arising 'from the ordinary relationship of employer and employee', as known to the law of the state; and that, to do so, would require a clearly expressed intent to that end on the part of the legislature. This conclusion of the state court amounts to a judicial interpretation of the legislative intent with respect to the scope of the compensation act, and, as such, constitutes a construction of the state statute."

This is supported by this Court in the Tipton case, for speaking through Mr. Justice Roberts, at page 155, the Court said:

> "A definite and authoritative decision, that its

scope is so limited, and that the appropriate remedy under said law is an action for damages, will, of course, be binding upon Federal Courts."

The same principle was announced in the case of *Red Cross Line v. Atlantic Fruit Company*, 264 U. S. Supreme Court Reports, page 109, speaking through Mr. Justice Brandeis, at page 115, says:

> "The argument is that the Court of Appeals held as a matter of statutory construction that the arbitration law does not extend to controversies which are within the admiralty jurisdiction; and that the substantive claim sought to be enforced is so cognizable, the claim to recover an amount paid under a charter party, as charter hire, is within the admiralty jurisdiction. * * * * If that court had construed the arbitration law as excluding from its scope controversies which are within the admiralty jurisdiction, the construction given to the State statute would bind us, and there would be no occasion to consider the constitutional question presented."

The Supreme Court of Pennsylvania sought the legislative intent of the framers of the Workmen's Compensation Act and interpreted that statute in the light of that intent. That the Supreme Court correctly interpreted the legislative intent is evidenced by the fact that the Legislature when it amended the Workmen's Compensation Act of 1915, in 1937, which was a thorough and extensive correction to the Workmen's Compensation Act of 1915, again was silent upon this subject, and that same Legislature passed the Statutory Construction Act, so that the amendment, by every reasonable implication, accepted the interpretation of the Pennsylvania Workmen's Compensation Act as made by the Supreme Court of Pennsylvania in the Sims and Miller cases, *supra*.

The situation in this case presents a very serious di-

lemma insofar as it affects the petitioner in this case. Here we have a serious judicial controversy as to whether or not the Pennsylvania Supreme Court properly interpreted the Pennsylvania Workmen's Compensation Act in the Miller case, or whether it felt itself impelled, because of the Federal Safety Appliance Act, to read an exception into the Pennsylvania Workmen's Compensation Act, because it thought that the proper construction of the Federal Safety Appliance Act gave to Miller a cause of action in a Court of Law.

If Breisch had started his proceedings in the State Court of Pennsylvania instead of the Federal Court, it is seriously doubted whether this question, as presently advanced in these proceedings, would have prevailed, because the Supreme Court of Pennsylvania has recognized a right of action at law, under circumstances similar to those here involved, and it was not until the Miller case that this question came squarely before the Supreme Court of Pennsylvania for determination, and in that case, the Supreme Court reaffirmed its position that it had taken in several earlier cases. After all, the Supreme Court of Pennsylvania had to consider the legislative intent of the framers of the Workmen's Compensation Law of Pennsylvania. This it did. What tribunal could give the framers of this legislation a truer and more correct interpretation than the Supreme Court of Pennsylvania? Judge Dickinson and Justice Jones accepted its interpretation as the law in Pennsylvania.

Assuming for the purpose of argument, that the Supreme Court of Pennsylvania misinterpreted the Federal Safety Appliance Act, and believed that it gave a right of action, nevertheless, it had to give to the Pennsylvania Workmen's Compensation Act the legislative intent of its framers, and that legislative intent it gave when it held in the Miller case that "demands not arising from the ordinary relation of employer and employee, such as the

enforcement of rights fixed by federal statute, their powers remain as if no such State legislation was in force."

If the Supreme Court was wrong in its interpretation of said Act, as we have stated before, the Legislature had the power to correct this erroneous construction since the decision in the Miller case in 1928. That it did not do so, gives to the decision in the Miller case, a statutory construction in harmony with the legislative intent.

THE PENNSYLVANIA SUPREME COURT DID NOT MISINTERPRET THE DECISION MADE IN THE McMAHAN v. MONTOUR RAILROAD COMPANY CASE BY THE UNITED STATES SUPREME COURT

Did the Supreme Court of Pennsylvania misunderstand the reason for its reversal by the Supreme Court of the United States in the case of *McMahan v. Montour R. Co.*, 270 U. S. 628? We assert it did not. The argument is raised that the Pennsylvania Supreme Court misunderstood the reason for the reversal "due to an apparent misapprehension of the basis of its reversal by the Supreme Court in McMahan v. Montour, the Supreme Court of Pennsylvania in *Miller v. Reading Company*, 292 Pa. 44, 140 A. 618, held that the claim of an injured employee of an interstate railroad was not cognizable under the State Compensation Act if the employee was injured by reason of a defective appliance upon a car engaged in a purely intrastate movement" (Record p. 112). Respondent argued this point in the court below and also in his opposing brief to the petition for certiorari. This is not the first time this question has been before your Honorable Court. It appeared in the Tipton Case (*supra*) at page 148.

What was the issue in the McMahan v. Montour case?

It was this. The Montour Railroad was located entirely within the State of Pennsylvania and "was not a highway of interstate commerce," therefore the sole remedy afforded the injured employee was the Pennsylvania Workmen's Compensation Act. This is the Court's opinion in *McMahan v. Montour R. Co. case*, 73 Pittsburgh Legal Journal 487 (1923). The plaintiff had been nonsuited in the trial court which held that the Safety Appliance Act did not apply because the railroad involved was not a "highway of interstate commerce."

This case, on appeal, came before the Pennsylvania Supreme Court, 283 Pa. 274, which affirmed the lower court's decision; as appears on page 276 thereof as follows:

> "We agree with the court below that the facts proved do not bring plaintiff within the act relied on, and it did not err in denying a right to recover in the present action." The court further said that the "Montour Railroad does not in any sense constitute a highway of interstate commerce nor is it 'connected with' such commerce in a way to make it in effect an interstate line."

Thus it was clearly held by the Pennsylvania courts that the Montour Railroad in question was not a highway of interstate commerce.

The Supreme Court of the United States then reversed the Supreme Court of Pennsylvania in the Montour case (*supra*), by holding that it was a "highway of interstate commerce," and therefore the Safety Appliance Act applied.

Did the Pennsylvania Supreme Court understand the reason for the reversal? It did.

In the Miller case (*supra*) at page 47, the Pennsylvania Supreme Court said that "the Safety Appliance Act protects intrastate traffic on an interstate highway such

as defendant in the present instance was engaged in (*Sims v. P. R. R. Co.*, 279 Pa. 111), and this *is true although the railroad itself is entirely within the boundary of the state, if it has a connecting point with one passing beyond.* (*McMahan v. Montour*, 270 U. S. 628.)

Even the Circuit Court in its opinion fell into error because it believed that the Supreme Court of Pennsylvania thought it was reversed because it held the remedy for the breach of duty imposed by the Safety Appliances Acts lay in the Workmen's Compensation Act, and not because of the question of whether or not it was a highway of interstate commerce. So that when the Miller case came before it, it had to hold the opposite view, namely, that the remedy was not in the Pennsylvania Workmen's Compensation Act, but that it was by reason of the existence of a Federal Statute.

Strange as it may appear, those who assert that the Pennsylvania Supreme Court misunderstood the reason for the reversal by the United States Supreme Court of the Montour case, themselves appear to have acted under a misinterpretation of this court's decision in said case.

Mr. Justice Roberts did. In speaking for this Court in the Tipton case (148) when he said that the Pennsylvania Supreme Court was reversed "because of its erroneous decision that the Federal Acts were inapplicable to the cars used in intrastate operations of the railroad, *although it was a highway of interstate commerce.*"

Even the Circuit Court in this case fell into the same error. The only question before the lower and Pennsylvania Supreme Court, was whether or not the Montour Railroad was a highway of interstate commerce—(It erroneously decided that it was not).

The foregoing analysis clearly supports the contention that the Pennsylvania Supreme Court did not misapprehend the basis of its reversal by the United States Supreme

Court of Pennsylvania of the McMahan v. Montour R. Co., when it decided Miller v. Reading Company. The Circuit Court of Appeals is wrong in believing that it did.

All of this strengthens the contention that the Supreme Court of Pennsylvania in the Miller case (*supra*) gave to the Pennsylvania Workmen's Compensation Act a definite interpretation, free from any misunderstanding of the decision of the Montour case by the United States Supreme Court.

THE CASES CITED BY RESPONDENT IN SUPPORT OF ITS CONTENTION DO NOT AFFECT THE EXISTING LAW OF PENNSYLVANIA INSOFAR AS THE RIGHTS OF THE PETITIONER ARE CONCERNED

In answer to respondent's brief, we assert that the Tipton and Gilvary cases do not control the decision of the present case. They stand for a different proposition. The Tipton case states definitely that a state has a right to substitute a Workmen's Compensation Act for that of a common law right of action, but whether or not that substitution has been made is always a question for the highest Court of that state to determine. The State Court has the right to pass upon the construction of the Workmen's Compensation Act, and if it decides that it is all inclusive, and that no exceptions to that act exist, then naturally, the United States Courts must follow the decision of that State Court, but the Supreme Court of Pennsylvania construed the Workmen's Compensation Act and held that the Compensation Act of Pennsylvania was not the exclusive remedy, but left to the aggrieved party, injured in circumstances like those in the present case, a right of action at law. The Supreme Court in *Tipton v. Atchison,*

T. & S. F. R. Co., 104 A. L. R., page 831 at pages 836 and 837 said:

> "If these decisions of intermediate courts of appeal," (referring to the Walton and Ballard cases) "and the refusal of the Supreme Court of California to review them, amount to no more than a judicial construction of the compensation act as having, by its terms, no application in the circumstances, they are binding authority in Federal Courts."

This supports the decision of the Supreme Court in the Miller case.

The Gilvary case held that an election and agreement by an interstate railroad carrier and its employee to be bound by the State Workmen's Compensation Act so as to bar recovery by the employee under the Federal Safety Appliance Act for injuries suffered while engaged in intrastate commerce is not repugnant to the Federal Safety Appliance Act. In this case Gilvary had signed an agreement to be bound by the Workmen's Compensation Act of the State of Ohio. He had made his election, and therefore, was bound thereby. Mr. Justice Butler, said, in speaking for the Supreme Court of the United States, 292 U. S. 57, at pages 61 and 62:

> "The opinion supports our recent construction of these Acts" (Employee Liability Act and the Safety Appliance Acts) "that, while they prescribe the duty, the rights to recover damages sustained by the injured employee through the breach 'sprang from the principle of the common law' and was left to be enforced accordingly, or in case of death 'according to the applicable statute.' * * * These acts do not create, prescribe the measure or govern the enforcement of, the liability arising from the breach. They do not extend to the field occupied by the state compensation Act."

The Court speaking of the Safety Appliance Acts, said further, at pages 60 and 61:

> "So far as the safety equipment of such vehicles is concerned, these Acts operate to exclude state regulation whether consistent, complementary, additional or otherwise. * * * The imposition of penalties and abrogation of assumption of risk are measures for enforcement.
>
> A violation of the Acts is a breach of duty owed to an employee, whether he is at the time engaged in interstate or intrastate commerce. And by abolishing assumption of risk the Acts impliedly recognize the right to recover for injuries resulting therefrom."

This dictum expressed by Mr. Justice Butler, in no way affects the decision of the Supreme Court of Pennsylvania in granting to employees injured under similar circumstances as that suffered by Breisch, petitioner in this case, a common law right of action.

There is another case which has been cited by respondent, known as *Geraghty vs. Lehigh Valley Railroad*, 83 Fed. (2nd) 738, as being an authority in support of their contention. In that case, the plaintiff was injured in an intrastate movement as an employee of the Lehigh Valley Railroad Company, engaged in interstate commerce, in an intrastate movement. The Circuit Court of Appeals decided that his only remedy was the Workmen's Compensation Act of the State of New Jersey. The State of New Jersey, either by statute or by the decision of its highest appellate court provided for no other remedy, other than the Workmen's Compensation Act of the State. If the Appellate Court of New Jersey had made an exception to the Act and provided for an alternative remedy, we assert that the Circuit Court of Appeals, which was the same Court that affirmed the decision of the Leuthe

case, which, however, had its origin and situs in the State of New York, wherein the Court of Appeals of that state gave to Leuthe a right of recovery, in spite of the Workmen's Compensation Act of that State, would have reached in the Geraghty case, the same conclusion as it did in the Leuthe case.

The respondent also cited the following Pennsylvania cases, in support of their contention. They are the cases of *Venezia, Appellant v. Philadelphia Electric Co.*, 317 Pa. page 557; *Campagna, Appellant v. Ziskind*, 287 Pa. page 403; and *Persing, Appellant v. Citizens Traction Co.*, 294 Pa. page 230. None of these cases involve a defendant engaged in intrastate commerce, or in any way involves the Safety Appliance Act of Congress. They are purely domestic cases. In the Persing case, it was the case of a motor mechanic, working for a trolley company which operated in Oil City, Pennsylvania, and operated exclusively within the State of Pennsylvania. In the Venezia case, the plaintiff was engaged in digging a trench as a laborer for the Philadelphia Electric Company. In the Campagna case, the plaintiff was a stone mason and was engaged at the time as a mason in constructing buildings. Not one of the defendants was engaged in interstate commerce.

Therefore, these cases are inapplicable and can have no bearing upon the solution of the legal proposition involved in the present case. Mr. Justice Sadler wrote the opinion of this Persing case and counsel would have us believe that because the Miller case is cited, that therefore, the Miller case was modified or the position of the Court changed. This is untenable for the reason that the Safety Appliance Act was not involved in that decision. The facts in the Persing case as hereinbefore referred to, involved a street car company. The facts are totally different and there is nothing inconsistent with the Court's decision in the Persing case, and it is perfectly consistent in its ruling.

but it left the Miller case unscathed, so that Breisch, the petitioner, when he brought suit in the United States District Court, in trespass, was within his remedial rights.

IN PENNSYLVANIA, ONE INJURED BY REASON OF THE VIOLATION OF THE FEDERAL SAFETY APPLIANCE ACT, HAS THE RIGHT OF REDRESS BY AN ACTION AT LAW.

Such is the law of the State of Pennsylvania today. Therefore, unless the Legislature of Pennsylvania passes an amendment to specifically include all those injured as the result of a violation of the Federal Safety Appliance Act, then the decision of the Supreme Court of Pennsylvania, interpreting the Pennsylvania Workmen's Compensation law in the case of Miller vs. Reading Company *(supra)*, remains the law of this state. Until that interpretation of the Miller case is changed by the Supreme Court of Pennsylvania and that Court decides that the Compensation Act is the exclusive remedy in cases similar to the facts involved in the Breisch case, then until that day has arrived, Breisch, the petitioner in this case, and all others similarly affected, still have in Pennsylvania an alternative remedy.

In the case of *Erie Railroad Company vs. Tompkins*, 114 American Law Reports, Annotated, 1487, the United States Supreme Court, speaking through Mr. Justice Brandeis, said, at page 1492:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Further in his opinion, he said, at page 1493:

> "Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State, and, to that extent, a denial of its independence."

Therefore, we assert that the cases of *Tipton vs. Atchison T. & S. F. R. Co.*, 104 A. L. R. 831, *Gilvary vs. Cuyahoga*, 292 U. S. 57, *Geraghty vs. Lehigh Valley Railroad Company*, 83 Fed. (2) 738, and the *State Tax Commission vs. Van Cott*, 306 U. S. 511, 514, do not control this Court's decision in this case, because the legislature of Pennsylvania did not intend to include railroad employees injured by a violation of the Federal Safety Appliance Acts, as the exclusive remedy under the Pennsylvania Workmen's Compensation Act. Furthermore, the Pennsylvania Supreme Court in the Miller case (*supra*), gave to the Pennsylvania Workmen's Compensation Act, a statutory interpretation of said act in support of the legislative intent of the framers of said legislation.

We, in addition to the arguments advanced in this brief on behalf of the petitioner, assert that the very learned opinions of Judge Dickinson in the Court below, and that of Mr. Justice Jones in his dissenting opinion in the Circuit Court of Appeals for the 3rd Circuit of the United States, correctly interpreted the existing law of Pennsylvania. For the reasons herein assigned, we respectfully ask this Court to reverse the decision of the Circuit Court of Appeals for the 3rd Circuit and affirm the judgment of the Court below.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX

I.

Safety Appliance Act

"It shall be unlawful for any common carrier subject to the provisions of this chapter to haul, or permit to be hauled or used on its line, any car subject to the provisions of this chapter not equipped with appliance herein provided for, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

(April 14, 1910, c. 160, Sec. 2, 36 Stat. 298.)

Pennsylvania Workmen's Compensation Act

The employer shall be liable for the negligence of all employes, while acting within the scope of their employment, including engineers, chauffeurs, miners, mine-foremen, firebosses, mine superintendents, plumbers, officers of vessels, and all other employes licensed by the Commonwealth or other governmental authority, if the employer be allowed by law the right of free selection of such employes from the class of persons thus licensed; and such employes shall be the agents and representatives of their employers, and their employers shall be responsible for the acts and

neglects of such employes, as in the case of other agents and employes of their employers; and, notwithstanding the employment of such employes, the property in and about which they are employed, and the use and operation thereof, shall at all times be under the supervision, management and control of their employers.

(Act of 1915, dated June 2, 1915, P. L. 736, 737, Sec. 202).

(This Act has been re-enacted by the Act of June 4, 1937, without change).

AMENDMENT TO PENNSYLVANIA WORKMEN'S COMPENSATION ACT OF 1915, AMENDED JUNE 4, 1937, P. L. 1552, SECTION 108, ARTICLE 1.

"For the purpose of this act, minors shall have the same power to contract, file claims for compensation and receive compensation as adult employes, subject, however, to the power of the board, in its discretion, at any time to require the appointment of a guardian to contract or to receive moneys thereunder or under an award for the benefit of any such minor. Any minor employed by his parent or parents shall have the right to file a claim for compensation under this act against such parent or parents in his own name and in his own right, and to enforce the payment of such compensation."

STATUTORY CONSTRUCTION ACT

By the Act of May 28, 1937, Page 1019, Article 4, Section 52, Number 4 of said section reads as follows:

"That when a court of last resort has construed the language used in a law, the Legislature in subsequent laws on the same subject matter intend the same construction to be placed upon such language;"